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GOOGLE INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 ORACLE AMERICA, INC.,
16 Plaintiff,
17 v.
18 GOOGLE INC.,
19 Defendant.
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Case No. CV 10-03561 WHA

**GOOGLE'S RESPONSE TO THE
COURT'S OCTOBER 26, 2015 ORDER RE
DAMAGE STUDIES**

Date Filed: August 12, 2010

Trial Date: May 9, 2016

1 In an October 26, 2015 Order, the Court directed the parties to “advise the other and [the
2 Court-appointed Rule 706 damages expert] Dr. Kearl ... of each liability period it intends to
3 address before the jury” and directed that “all studies should specifically calculate damages for
4 those alternative possibilities.” [Dkt. 1349 (Oct. 26, 2015 Order) at 1:19-21.] The Court further
5 directed Google and Oracle to “meet and propose a more specific plan to address this problem,”
6 and then report back to the Court by today, November 9, 2015. Google and its damages experts
7 have considered the Court’s request, and counsel for Google and Oracle met and conferred by
8 telephone about this issue on November 5, 2015, and thereafter by email. Based on these
9 discussions, Google makes the following response to the Court’s October 26, 2015 Order.

10 Google understands from Oracle’s filings, and Oracle’s counsel confirmed during meet-
11 and-confer discussions, that Oracle alleges that Google began infringing Oracle’s copyrights
12 during development of the Android operating system, and that Google’s alleged infringement
13 extends from that point until the present day. Google further understands that Oracle, which has
14 the burden of proof on damages, does not intend to make distinctions in its entitlement to
15 damages for different portions of the overall time period at issue in this case, but will present a
16 unified damages case extending from the date of first alleged infringement to the date of the jury
17 verdict. Conversely, Google intends to prove that, for the entire time period at issue, its use of
18 portions of 37 Java API packages always has been a fair use protected by the Copyright Act, and
19 that Oracle always has been equitably estopped from suing Google for copyright infringement
20 and barred by laches from recovering Google’s profits attributable to the alleged infringement.

21 Accordingly, because Google understands that Oracle does not plan to argue, even in the
22 alternative, for a finding of liability only for one portion of the overall time period at issue,
23 Google similarly understands that neither party intends or would need to present an expert report
24 on damages that subdivides the alleged liability period. Google intends to present a report that
25 calculates damages under the assumption that Oracle prevails on liability for the entire period at
26 issue—*i.e.*, from Google’s first (fair) use of Java API materials to the date of the jury verdict.

27 With respect to damages that might accrue *after* a jury verdict finding liability, the Court
28 has already ruled that this is not a question for the jury or the proper subject of expert testimony.

1 In a January 9, 2012 Order, the Court ruled that,

2 If liability is established at trial, the jury will be asked to make a finding of the
 3 reasonable royalty rate for each infringed patent claim and copyright. ***If an***
 4 ***injunction is not granted, then the royalty rate found by the jury will be used to***
 5 ***award supplemental damages on a year-to-year basis, this for ongoing damages***
 6 ***after the last damages period calculated. If an injunction is granted, there will***
 7 ***be no need for future damages.*** Either way, [Oracle's damages expert] will not
 8 be allowed to testify about damages after the end of 2012.

9 [Dkt. 685 (Jan. 9, 2012 Order) at 11:1-6 (emphasis added).] Based on this, Google understands
 10 that neither party will offer, the Court will not entertain, and the jury will not hear or apply any
 11 expert damages opinions for the period of time after the date of the jury verdict.

12 Finally, Google is mindful that the parties have not yet served their damages reports, filed
 13 any *Daubert* challenges, or brought any other pretrial motions that might affect the scope of
 14 evidence presented at trial. Google and Oracle have agreed that, in the event that any Court
 15 ruling on any future motion creates a limitation on liability or damages for a particular time
 16 period, the parties will meet and confer, submit supplemental expert reports if appropriate, and
 17 make their experts available for a short deposition on any supplemental reports.

18 Dated: November 9, 2015

KEKER & VAN NEST LLP

19 By: /s/ Robert A. Van Nest
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